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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 177.....

THE PENNSYLVANIA RAILROAD COMPANY,

Petitioner,

against

CLYDE W. KRENGER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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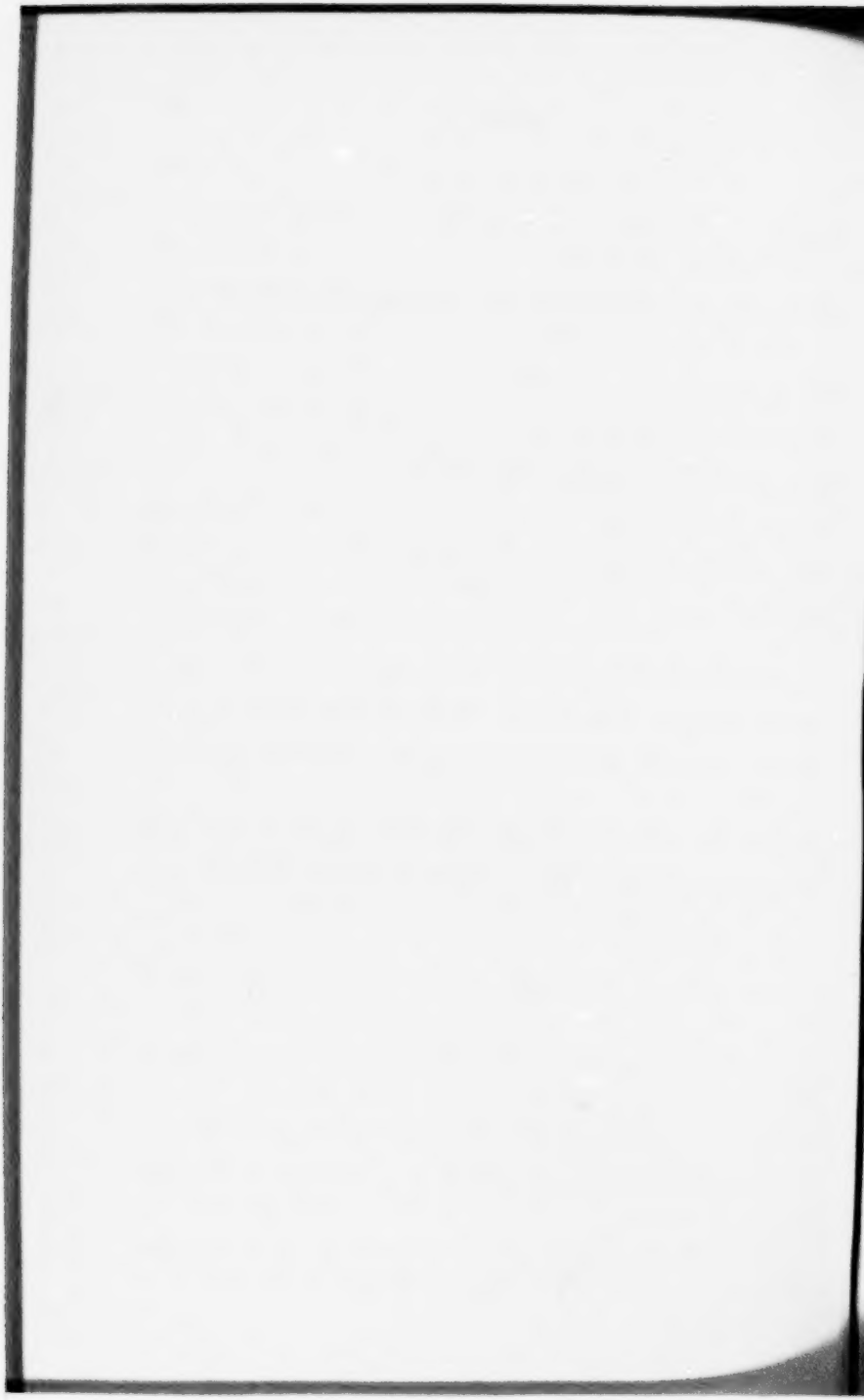

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The Pennsylvania Railroad Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this cause on April 14, 1949 (R. 431).

Opinions Below

The opinion and the concurring and dissenting opinions of the United States Court of Appeals for the Second Circuit have not yet been officially reported, but appear in the record on pages 421-430. The opinion of the United States

Court of Appeals for the Second Circuit denying the petition for rehearing has likewise not been officially reported, but appears in the record on pages 455-457. The opinion of the United States District Court on respondent's motion to strike paragraphs IV to VIII of the answer is reported in 8 F. R. D. 65, and appears in the record on pages 25-27.

Jurisdiction

The judgment of the United States Court of Appeals was entered on April 14, 1949 (R. 431) and a petition for rehearing was denied with an opinion on May 25, 1949 (R. 455-457). Jurisdiction is conferred upon this Court to review this case by writ of certiorari under Title 28 United States Code, Section 1254.

Questions Presented

The principal questions raised by the holding of the Court of Appeals are as follows:

1. Is a contract, by which a railroad employee agrees that he will not start or prosecute a suit against his common carrier employer, to recover damages for an injury which he has theretofore sustained while engaged in interstate commerce, in any court except one of those sitting within the state where his injuries were sustained or within the state where he resided at the time of the accident, provided that service can be obtained upon the carrier in such state, rendered void by the provisions of the Federal Employers' Liability Act, 45 U. S. C. 51-60; 35 Stat. 65, Secs. 1-10* (hereinafter sometimes referred to as "the Act")?

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* See *Grand Trunk Western R. Co.* v. *Boyd*, 321 Mich. 693, *cert. granted* ..... U. S. ....., 69 Sup. Ct. 1166.

2. Where in cases under the Act a common carrier pleads such a contract with an injured employee, is the burden of proof upon the carrier to prove that the employee was fully advised of the effect of the contract upon his rights?

3. Where a District Court, before the impaneling of a jury and before the trial of any issue of fact, had granted a motion striking from the answer a defense predicated upon such a contract on the ground that such a contract was as a matter of law rendered void by Section 5 of the Act, but where two of the three judges of the United States Court of Appeals held that the contract was not so rendered void by the Act, was it correct for the said Court of Appeals nevertheless to affirm upon a holding that the contract was unenforceable because the carrier had not proved the facts showing that the employee was fully advised of its effect upon his rights?

Statute Involved

The statute here involved is the Federal Employers' Liability Act, 35 Stat. 65, Secs. 1-10, as amended (45 U. S. C. 51-60). The applicable sections are Sections 1, 5 and 6 (45 U. S. C. 51, 55, 56); and the pertinent provisions thereof are set forth in the Appendix (*infra*, pp. 26-27).

Statement

Two months after respondent, a resident of the State of Ohio, sustained personal injuries there, while employed as yard conductor by petitioner, a corporation of the Commonwealth of Pennsylvania, the parties entered into the agreement, the validity and enforceability of which are here involved. The respondent was paid by the petitioner the sum of $250 and in consideration thereof

agreed as follows (R. 6-7; 413):

> "I will not start or prosecute suit against said The Pennsylvania Railroad Company, to recover damages for my injuries in any court except one of those sitting within the State where my injuries were sustained or within the State where I resided at the time my injuries were sustained, provided service can be obtained on said The Pennsylvania Railroad Company in either of said States."

The contract also provided that the sum so paid and such additional sums as might be advanced were to be retained by respondent, but if any action should be brought they were to be deducted from or credited on any amount finally allowed in settlement or by judgment. Thereafter, from time to time additional advances under similar agreements were made until they aggregated $1,750 (R. 20). It is conceded that petitioner and respondent were engaged in interstate commerce (R. 22, 23).

Subsequently, respondent caused the summons and complaint to be served upon petitioner in New York and instituted this action in the United States District Court for the Eastern District of New York, and not as he had agreed in a state or federal court sitting within the State of Ohio where the accident occurred and where he continued to reside (R. 4, 6, 7). The action was brought under the provisions of the Federal Employers' Liability Act, 35 Stat. 65, Secs. 1-9, as amended, Title 45 U. S. C., Secs. 51-59 (R. 4).

In its answer, petitioner denied liability and in paragraphs IV to VIII thereof alleged the foregoing agreement, the consideration therefor, the fact that respondent resided and continued to reside in the State of Ohio, that the accident occurred at the South Akron, Ohio, yard operated by petitioner, and that petitioner could be served with process in that state (R. 6-7).

In his reply (R. 20), respondent did not deny making the covenant but alleged that the aggregate consideration was to be $2,000 payable in equal monthly instalments of $250 each, that petitioner had refused to pay the last instalment, and that the agreement was made under circumstances such that the execution thereof was not respondent's voluntary act.

Before a jury had been impaneled, respondent moved, in the words of the court (R. 24, 26), "to strike the separate defense alleged in paragraphs IV to VIII, inclusive, of the defendant's answer on the grounds that the agreement hereinabove referred to is void and in contravention of the rights of the plaintiff under Sections 55 and 56 of the Federal Employers' Liability Act, and that the said separate defense is therefore insufficient in law."

The court, by Hon. Leo F. Rayfiel, U. S. D. J., after summarizing the facts and the argument in an opinion (R. 25-27, reported at 8 F. R. D. 65), decided that

> "The right to prosecute this action in this district is an important and valuable right, the denial of which would contravene both the letter and the spirit of Section 55. It appears to me that recourse may be had to legislation alone for the correction of such inconveniences and hardships as the statute may entail.
>
> "The motion of the plaintiff is therefore granted."

An order was entered embodying said decision (R. 415), before the jury was impaneled to hear disputed questions of fact (R. 28). After a trial and verdict by the jury, judgment was rendered for respondent for $28,750 on March 2, 1948 (R. 416). On March 27, 1948, petitioner appealed from the said order and the said judgment (R. 417).

On April 14, 1949, the Court of Appeals affirmed the judgment of the District Court, Judge Swan dissenting. Judge Clark, who wrote for affirmance, held that the agreement was void under the provisions of Section 5 of the Federal Employers' Liability Act (R. 421-427). Judge Learned Hand and Judge Swan ruled that Section 5 of the Act did not bar such contracts (R. 427-428, 430). However, Judge Hand, in a concurring opinion for affirmance, held that such a contract is unenforceable unless the railroad shows that the employee was fully advised of its effect upon his rights and that "in the case at bar the road proved nothing on the subject" (R. 430).* Judge Swan was of the opinion that such a contract, like any other, may be impeached for fraud or mutual mistake, but, unless so impeached, should be respected (R. 430). A petition for rehearing (R. 432-437) was denied by the Court of Appeals on May 25, 1949 (R. 456-457) with an opinion by Judge Hand (R. 455-456).

Specification Of Errors To Be Urged

The Court of Appeals for the Second Circuit erred:

(1) In refusing to reverse the order and judgment of the District Court which held that the contract, limiting the venue to a court sitting in the state where the respondent resided and the accident occurred, was in contravention of the provisions of the Federal Employers' Liability Act and void.

(2) In placing upon petitioner the burden of showing that, at the time the contract was made, the respondent had been fully advised of its effect upon his rights.

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* It will be subsequently shown (pp. 12-13, *infra*) that the proceedings had not yet progressed to the stage where such proof could be offered in due course.

(3) In holding that the allegations concerning the contract in paragraphs IV to VIII of the answer were, upon motion, properly stricken from that pleading, before the impaneling of the jury, because petitioner had not proved that, at the time the contract was made, the respondent had been fully advised of its effect upon his rights.

(4) In refusing to reverse and remand the case to the District Court to try the issues of fact affecting the enforceability of the contract.

Reasons for Granting the Writ

I.

The Court of Appeals has decided important questions of federal law which have not been but should be settled by this Court.

Question 1 (*supra,* p. 2), whether a contract, by which an employee agrees to institute his action under the Federal Employers' Liability Act only in a state or federal court sitting in the state where he resides or where the accident occurred, is rendered void by the provisions of the Federal Employers' Liability Act, and Question 2 (*supra,* p. 3) whether, if such a contract is not so rendered void by the Act, it is nevertheless unenforceable unless the employer has sustained the burden of showing that when making the contract the employee had been fully advised of its effect upon his rights, are important questions of federal law which have not been but which should be settled by this Court.

Judge Clark followed the District Judge and answered Question 1 in the affirmative (R. 421-427); Judges Learned Hand and Swan answered Question 1 in the negative (R. 427-428, 430). Judge Hand answered Question 2 in the

affirmative (R. 430), while Judge Swan answered it in the negative (R. 430).

In his concurring opinion Judge Hand said (R. 427):

> "There has been a spate of decisions as to whether, after he has been injured, an employee may make a valid contract which limits the choice of forums allowed him by § 6. Some of these have held such contracts valid; some have held them invalid under § 5; * * * obviously, the situation is one where only the Supreme Court can speak with finality."

Judge Swan, in his dissenting opinion, said (R. 430):

> "I should prefer to withhold decision to await action by the Supreme Court in *Grand Trunk Western R. Co.* v. *Boyd,* 321 Mich. 693, petition for certiorari pending."

This Court, on June 7, 1949, granted the petition for a writ of certiorari in *Grand Trunk Western R. Co.* v. *Boyd,* 321 Mich. 693, ... U. S. ...., 69 Sup. Ct. 1166, in which the question presented was:

> "Were the contracts entered into between Petitioner and Respondent in the circumstances of this case void under Section 5 of the Federal Employers' Liability Act, for the reason that their effect was to enable Respondent to exempt itself from a liability created by Section 6 of the Act."

While the question presented in the *Boyd* case is substantially similar to our Question 1 (*supra,* p. 2) it does not comprehend our Question 2 or the principle enunciated in the concurring opinion. Judge Hand, after holding that Section 5 does not bar such contracts, stated his reason for joining in the affirmance (R. 430):

> "I would hold such contracts unenforceable unless the road shows that the employee was fully advised of

their effect upon his rights. I need not say what advice is necessary for in the case at bar the road proved nothing on the subject".

It is important that these questions be settled by this Court.

II.

There is a sharp conflict in judicial opinion with respect to the validity of such contracts which ought to be resolved by this Court.

We have seen that two of the three judges of the United States Court of Appeals for the Second Circuit deciding the instant case have held that such a contract was not violative of Section 5 of the Act (*supra*, p. 6).

In the other case decided by a Circuit Court of Appeals, *Akerly* v. *New York Cent. R. Co.*, 168 F. 2d 812 (C. C. A. 6th), two of the three judges held the contract was in contravention of Section 5.

The highest courts of the states have divided as follows:

The Supreme Court of Michigan and the Supreme Court of Minnesota have held such agreements valid.

Grand Trunk Western R. Co. v. *Boyd*, 321 Mich. 693, *cert. granted* ..... U. S. ....., 69 Sup. Ct. 1166;
Detwiler v. *Lowden*, 198 Minn. 185.

On the other hand, three of the five judges of the Supreme Court of Utah held invalid a contract under the Act, construed to limit the venue to a single federal district court, excluding the state court. *Petersen* v. *Ogden Union Railway & Depot Company*, 110 Utah 573.

The federal district courts are likewise not in agreement. Such contracts have been sustained in the following decisions:

Roland v. *Atchison, T. & S. F. Ry. Co.*, 65 F. Supp. 630 (D. C., N. D. Ill.);
Herrington v. *Thompson*, 61 F. Supp. 903 (D. C., W. D. Mo.);
Clark v. *Lowden*, 48 F. Supp. 261 (D. C., D. Minn.);
Detwiler v. *Chicago, R. I. & P. Ry. Co., et al.*, 15 F. Supp. 541 (D. C., D. Minn.);
Peterson v. *N. Y. Central R. Co.* (D. C., N. D. Ill.), an unreported decision (see 62 F. Supp. at p. 593).

The decisions in the following cases have held such contracts prohibited by Section 5 of the Act:

Sherman v. *Pere Marquette Ry. Company*, 62 F. Supp. 590 (D. C., N. D. Ill.);
Fleming, et al. v. *Husted*, 68 F. Supp. 900 (D. C., S. D. Ia.).

It is important that this diversity of opinion be resolved by this Court.

III.

The Court of Appeals has decided federal questions in a way probably in conflict with applicable decisions of this Court.

In his dissenting opinion, Judge Swan said (R. 430):

"Since a release of plaintiff's right to damages is valid unless impeached, *Callen* v. *Pennsylvania R. Co.*,

> 332 U. S. 625, 630, *a fortiori* a release of a mere venue privilege should be good, absent any charge of fraud or mistake in obtaining it."

In the *Callen* case the plaintiff had contended that a release in settlement of a cause of action violated Section 5 of the Act, which provides that a contract or device to enable a common carrier to "exempt itself from any liability created by this Act shall to that extent be void." However, this Court held (pp. 630-631) that it was obvious that such a release was not a device to exempt from liability but a means of compromising a claimed liability and that where controversies with respect to the existence or amount of liability exist, Congress has not said that the parties may not settle their claims without litigation. It would seem to follow that an agreement, by which plaintiff chooses a forum in which to try his cause of action, is not a device to exempt a carrier from liability but a means of selecting a place for an adjudication of that liability. Similarly where controversies exist, Congress has not said that the parties may not agree upon the forum in which the claim is to be determined and enforced. It is submitted, therefore, that as indicated in the dissenting opinion (R. 430) Judge Clark's holding that the venue contract was prohibited by Section 5 of the Act is in probable conflict with this Court's decision in the *Callen* case.

Furthermore, Judge Hand's decision (R. 430), that the carrier has the burden of showing that the employee was fully advised of the effect of the contract upon his rights, is likewise in probable conflict with the decision of this Court in the *Callen* case wherein it was said (332 U. S. 625, 630):

> "However persuasive the arguments there stated may be that inequality of bargaining power might well justify a change in the law, they are also a frank

recognition that the Congress has made no such change. An amendment of this character is for the Congress to consider rather than for the courts to introduce. * * * But until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by mutual mistake under which both parties acted."

If the burden of justifying a settlement for $250 of the entire cause of action which a jury subsequently valued at $24,990 is not on the carrier, it would seem to follow that it has no such burden in order to sustain a contract providing for the cause to be tried in the employee's home state where the accident occurred and the witnesses are to be found.*

In both respects, the decision of the Court of Appeals is probably in conflict with the applicable decision of this Court.

IV.

When a majority of the judges of the Court of Appeals disagreed with the decision of the District Court that the contract as a matter of law was in contravention of Section 5 of the Act, their failure to reverse and remand the case to the District Court to try any facts affecting the enforceability of the contract was a departure from the accepted and usual course of judicial proceedings such as to call for the exercise of this Court's power of supervision.

Irrespective of where the burden of proof lay (III, *supra*, pp. 10-12), the action had not progressed to a

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* Other portions of the decisions of the Court of Appeals probably in conflict with this Court's decisions will be shown on p. 13, *infra*.

proper stage for the introduction of evidence as to any disputed facts.

When the District Court, before a jury had been impaneled, decided that the contract was illegal *per se* because prohibited by the Act (R. 25-27) and entered its order (R. 415-416) striking from the answer paragraphs IV to VIII, all issues concerning the contract as prohibiting a trial in New York were excised from the case. If the District Court had sustained the validity of the agreement against the attack that it was void under the Act, then the orderly procedure would have been for the parties, after impaneling the jury, to offer evidence bearing upon the issues of fairness, fraud and other circumstances with respect to its enforceability.

But the concurring opinion would require the petitioner, at that time, to prove the facts concerning the advice to the employee (R. 430), although the District Court was deciding the motion to strike as a matter of law upon undisputed facts. Such a course, as will be more fully shown in the annexed brief (pp. 21-25, *infra*), would have required the District Court to subvert normal procedure and to withhold deciding what was in effect a demurrer until disputed facts had been tried to the jury. The decision, as embodied in the concurring opinion, which was essential to affirmance, is also in probable conflict with the applicable decision of this court in *Fountain* v. *Filson*, 336 U. S. 681.

Conclusion

In refusing to reverse the decision of the court below which had stricken from the answer the allegations concerning the employee's contract as violative of Section 5 of the Act, the Court of Appeals decided an important question of federal law which has not been, but should be, resolved by this Court. Cf. *Grand Trunk Western R. Co.*

v. *Boyd*, 321 Mich. 693, *cert. granted* ..... U. S. ....., 69 Sup. Ct. 1166. Furthermore, there is a sharp divergence of judicial opinion in the various state and federal courts with respect to the validity of such contracts. As to the applicable principles of law, the Court of Appeals for the Second Circuit differed with the decision of the Court of Appeals for the Sixth Circuit in *Akerly* v. *New York Cent. R. Co.*, 168 F. 2d 812. In respect to both the validity of the contract and the burden of proof, the decision of the Court of Appeals is probably in conflict with the decision of this Court in *Callen* v. *Pennsylvania R. Co.*, 332 U. S. 625. The concurring opinion, which was essential to the affirmance, is also probably in conflict with the decision of this Court in *Fountain* v. *Filson*, 336 U. S. 681.

For the reasons heretofore stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

THE PENNSYLVANIA RAILROAD COMPANY,
By JOHN VANCE HEWITT,
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New York, N. Y., July 6, 1949.

In the

Supreme Court of the United States

October Term, 1949

No. .....

The Pennsylvania Railroad Company,

Petitioner,

against

Clyde W. Krenger,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The opinions below, the statement as to jurisdiction, the statement of the case and the specification of errors to be urged are set forth in the petition at pages 1, 2, 3 and 6, respectively, and are not repeated here.

ARGUMENT

I.

The conflict in the decisions whether the Federal Employers' Liability Act renders void per se an employee's contract, made for a valuable consideration after the cause of action had arisen, to bring any action in the designated mutually convenient state or federal forum and not elsewhere, should be resolved by this Court.

On the question of the validity under the Act of agreements such as the contract at bar, there is a sharp divergence of judicial opinion as has been shown in the petition (*supra,* pp. 9-10). The argument in the cases holding such contracts void was adopted by Judge Clark and may be found in his opinion (R. 421-427). It is respectfully submitted that the reasoning of the courts sustaining such contracts is the more persuasive.

The type of contract rendered void by Section 5 of the Act (45 U. S. C. Sec. 55, 35 Stat. 65, Sec. 5, see Appendix) is one, the purpose or intent of which is to enable a common carrier to exempt itself from any liability created by the Act. The only liability created by the Act is found in Sections 1 and 2 (45 U. S. C. Secs. 51 and 52), wherein it is provided that every common carrier by railroad, while engaging in commerce as therein defined, shall be liable in damages to an employee for injury or death suffered while so employed and resulting from the faults of the carrier therein specified. Liability for damages is the sole liability created by the Act. There is no other. Sec. 51 is entitled "Liability of common carriers by railroad in interstate or foreign commerce, for injuries to employees from negligence; definition of em-

ployees." The "liability created by this Act," which Sec. 5 protects is the liability created by Sec. 1; and the type of contract rendered void by Sec. 5 is a contract the purpose and intent of which is to enable a common carrier to exempt itself from such liability. Since there is no finding that the purpose, intent or even tendency of the plaintiff's agreement was to enable the carrier to exempt itself from any liability created by the Act, that is, from any liability to pay damages for the injuries, the agreement is not, as the District Court and Judge Clark thought, rendered void by the provisions of Section 5.

The Supreme Court of Michigan, in *Grand Trunk Western Railroad Company* v. *Boyd,* 321 Mich. 693, *cert. granted* ..... U. S. ..... , 69 Sup. Ct. 1166, did not lose sight of the fact that the real question was one of Congressional intent, saying, at 321 Mich. 699:

> "If Congress by using the word liability in Section 55 had intended to include venue, such intent could have been readily and clearly expressed. It is to be noted that Congress did not say 'exempt itself from any of the provisions of this chapter', but Congress says only 'from any liability created by this chapter.'
>
> "Section 51 of the chapter (hereinbefore quoted) declares the matters for which the employer is 'liable' and that liability is for injuries sustained by an employee. That liability in its various forms is plainly the liability contemplated in Section 55 in question."

This is also recognized in both the concurring and dissenting opinions in the case at bar (R. 427-428, 430).

The determination of venue within the limitations of Section 6 of the Act rests with the employee. If he should select a venue by bringing an action, it would not be suggested that he had in any way exempted the carrier from liability. When he voluntarily selects the locality of

the law suit he exercises the privilege which the Act confers. Ultimately he must do so. There is no basic difference between the employee's selection of his own state as the forum to enforce the claimed liability of the carrier by conducting a law suit therein and his selection of venue in such jurisdiction by way of a contract based upon a sufficient consideration. Many reasons might be suggested why the jurisdiction selected would be the most convenient and least onerous. That is particularly true where, as here, he has selected the state where he resides and where the witnesses to the accident are to be found. It is not even suggested that the respondent would not receive a fair and equitable trial in the federal or state courts sitting in Ohio, or that a jury chosen from his own locality after listening to their fellow townsmen as witnesses would not have reached a just verdict.

The purpose of the amendment adding the venue provisions to Section 6 was succinctly presented to the Senate by Senator Borah of the Committee on the Judiciary when he stated, as the objection to the then existing law, that a plaintiff might sometimes be compelled to travel a great distance to have his cause of action against the defendant because the action, in certain instances, would have to be brought in the district whereof the defendant was an inhabitant. The amendment, he said, would remedy that objection (45 Cong. Rec. 4034).

The instant contract is not in conflict with that purpose.

II.

The Court of Appeals has decided federal questions in a way probably in conflict with applicable decisions of this Court.

It has been heretofore shown in the petition (*supra*, pp. 10-12) that, in affirming upon the opinion (R. 421-427) and concurring opinion (R. 427-430), the Court of Appeals

has decided federal questions in a way probably in conflict with the applicable decision of this Court, *Callen* v. *Pennsylvania Railroad Company*, 332 U. S. 625, 630, as indicated in the dissenting opinion of Judge Swan (*supra*, p. 10; R. 430).

We are not unmindful of the distinction attempted in the concurring opinion (R. 429) that the burden of proof was on the carrier only with respect to the contract fixing the venue and not with respect to a contract of release and settlement. As to the former, Judge Hand held that the railroad must show that the employee had received "the advice of someone who adequately informed him of the effect of the contract upon his rights" (R. 456) "someone not in the defendant's employ", "a lawyer", although that qualification was not to be an "inflexible condition" (R. 456).

The reason given for the distinction was "Moreover, he [employee] is at a much greater disadvantage in estimating the effect of the contract upon his rights, than when he settles the claim. He is likely to suppose that one court is like another; and certainly he cannot be deemed to be acquainted with those differences between them which may in fact vitally affect his recovery" (R. 429). Perhaps, after considering an adequate survey of the problem, a jury might so find. However, with a total absence from the record of any such factual basis, the inference would seem to be to the contrary. When determining the venue by contract, he is surrendering only the opportunity for further "shopping for a judge or a jury"*, while in making a final settlement he is not only foregoing that opportunity but he is placing a value on his entire cause of action, for unlike the payment for a venue contract, beyond the consideration for a final settlement, he gets

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* Concurring opinion of Mr. Justice Jackson in *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, 706.

nothing. If the carrier need not sustain the burden of proof with respect to the employee's information when executing a release, the carrier should not be called upon to bear such a burden in order to sustain a venue contract.

When called upon to answer the petition for rehearing (R. 438) the respondent did not attempt to justify either the distinction or the conclusion in the concurring opinion (R. 440-450), but on the contrary sought to sustain the affirmance upon the doctrine that the venue contract was invalid under the Act (R. 440-441) or was barred by public policy (R. 442-447).

That such an agreement is not invalid under the Act has been shown (*supra*, pp. 16-18). Nor is it contrary to public policy. The distinction between such a contract and the agreements sometimes said to be against public policy is that in the instant case the contract pertains to a specific existing cause of action while the agreements sometimes condemned purport to control all causes of action which may arise in the future under any circumstances and conditions. The Restatement of the Law of Contracts, Section 558, provides the double test, condemning a contract which limits "unreasonably the tribunal to which resort may be had for the enforcement of a possible future right of action." The contract at bar meets both tests. It does not concern "a possible future right of action" nor does it "limit unreasonably" the venue of this action. It does not drag the employee across the country to a foreign jurisdiction but designates certain courts convenient for the parties and the witnesses to the accident. There is nothing *per se* unreasonable about litigating an Ohio law suit in Ohio. Instead of violating public policy a contract of the type at bar tends to avoid certain abuses of the venue provision of Section 6 which have been recognized by judges and by legislators. See concurring opinion in *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698 at pages 706-707; Report No. 613, House

of Representatives, 80th Congress, 1st Session; Devitt, Venue of Actions, 34 Amer. Bar Ass'n. Journal, pages 454 ff. (June, 1948).

Furthermore, the Act prescribes its own public policy, rendering void not all contracts affecting the provisions of the Act but only those contracts tending to exempt the carrier from any liability created by the Act. Unlike the contract in *Duncan* v. *Thompson,* 315 U. S. 1, the contract at bar did not have the effect of depriving the plaintiff of his right to enforce any liability of the carrier for damages. Such an agreement is not against public policy. It would be strange indeed if the right conferred by Section 6 is so inviolable that the employee is not permitted by law or public policy to part with it for its full value, and yet a court can give it away without consideration and against the owner's desire. *Ex parte Collett,* ..... U. S. ....., 69 Sup. Ct. 944; *Kilpatrick* v. *Texas and Pacific Railway Co.,* ..... U. S. ....., 69 Sup. Ct. 953.

III.

The failure of the Court of Appeals to reverse and remand the case to the District Court to try any facts affecting the enforceability of the contract was a departure from the accepted and usual course of judicial proceedings such as to call for the exercise of this Court's power of supervision.

Even if the burden of proof with respect to the advice given to the employee had been upon the carrier (see *supra,* pp. 19-20), the Court of Appeals should have remanded the case to the District Court to try such facts. Its failure to do so was a departure from the customary course of judicial proceedings.

The consideration of this question requires a recital of certain additional factual details not pertaining to the questions heretofore discussed.

The answer, in addition to the denials, contained two defenses addressed to the contract (R. 6-7 and 7-8). The first, reliance upon the contract to prevent suit in New York, was alleged in paragraphs IV to VIII (R. 6-7), subsequently stricken. The second was a partial defense setting forth the provisions in the contract for the deduction of the $1,750 from any judgment. This partial defense was never actually contested in the District Court.

After answer and upon motion, the District Judge directed (R. 19) "that the trial of all of the issues both of fact and of law arising out of paragraphs 'IV' to 'VIII', inclusive of the defendant's answer be tried and determined before the Court and a jury in advance of" the other issues. In his reply, the respondent claimed nonperformance, fraud and that the instrument was executed under circumstances such that the action was not his voluntary act (R. 20-21). With this setting that any facts with respect to paragraphs IV to VIII had been directed to be tried to a jury, the case came on for trial. Before a jury had been impaneled for the trial of such facts, respondent made his motion to strike paragraphs IV to VIII from the answer as in violation of Section 5 of the Act and therefore insufficient as a matter of law (R. 24, 26; p. 5, *supra*). This was a motion addressed to the law upon undisputed facts and in his consideration thereof without objection, the judge accepted the contract as if an exhibit to the pleadings.*

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* Before concluding his argument in opposition to the motion, the counsel for petitioner said: "I desire to submit herewith the original of that agreement executed by the plaintiff."

"The Court: The agreement is received in evidence" (R. 25). This was done without proof of authenticity and without objection.

If the learned judge had sustained the validity of the contract against the attack that it was void under the Act, then the parties after impaneling the jury would in orderly procedure have offered evidence bearing upon the issues of fact presented by paragraphs IV to VIII of the answer and by the reply thereto. But after the District Court decided that the contract was illegal because prohibited by the Act and entered its order striking the defense, all issues concerning the contract prohibiting the trial in New York had been excised from the case.*

However, Judge Hand held that when the motion was made it was part of defendant's case to prove the facts of the advice to the employee (R. 456). This would have required the petitioner to insist that the District Judge subvert the normal procedure and withhold deciding what was in effect a demurrer to the pleading until he had first tried to the jury the disputed facts relating thereto. For the carrier to have asked and then repeatedly insisted that the District Judge depart from the customary manner of trying a law suit in order to try facts concerning the enforceability of the contract before deciding the question of law as to its validity, would have been, at least, most unusual procedure. Its failure to do so does not merit the destruction of its rights.

In New York a party relying upon a contract is not required to plead that the circumstances under which it was obtained did not render it unenforceable. *Brearton* v. *DeWitt*, 252 N. Y. 495; see also *Dioguardi* v. *Durning*, 139 F. 2d 774 (C. C. A. 2d). We do not understand

---

* Any evidence with respect to the agreement or the payments of $250 or $1,750 (R. 448, 449; 453, 454) was subsequent thereto and related only to the provision that any payment should be credited on the judgment as alleged in the second partial defense, in paragraphs IX and X of the answer (R. 7, 8) the validity of which had not been contested and the provision of which had not been stricken from the answer.

that the concurring opinion holds to the contrary in this respect. Hence evidence of the advice given to the employee by someone not in the carrier's employ (R. 456) could not be readily offered until the court had overruled the demurrer, that is, denied the motion. The decision granting the motion was rendered immediately upon the conclusion of the argument regarding the effect upon the contract of Section 5 of the Act (R. 24-27). The concurring opinion seems to confuse the motion to strike a pleading on its face with a dismissal of the defense after proof. In this respect it is to be remembered that the concurring opinion which was essential to the affirmance went off on a proposition not considered by the District Court nor argued by counsel there or in the Court of Appeals. These matters were called to the attention of the Court of Appeals by a petition for rehearing timely made (R. 433-437).

The decision of the Court of Appeals in this respect is in probable conflict with the applicable decision of this Court called to its attention upon the application for rehearing (R. 454). In *Fountain* v. *Filson,* 336 U. S. 681, the United States Court of Appeals had disagreed with the decision of the District Court and then, upon facts not considered by that court below, had directed the entry of final judgment and thereafter denied a timely motion specifically calling the court's attention thereto. This Court reversed for the reason that "the order was made on appeal on a new issue as to which the opposite party had no opportunity to present a defense before the trial court" and directed that an opportunity be given to try the "new issue" before the District Court.

Upon disagreeing with the decision of the District Court that the contract as a matter of law was in contravention of Section 5 of the Act, the failure of the Court of Appeals to reverse and remand the case to the District Court to try any questions of fact affecting the enforceability of

the contract was a departure from the accepted and usual course of judicial proceedings such as to call for the exercise of this Court's power of supervision.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN VANCE HEWITT,
Attorney for Petitioner.

New York, N. Y., July 6, 1949.

Appendix

The relevant provisions of the Federal Employers' Liability Act (35 Stat. 65, Secs. 1-10 as amended; Title 45 U. S. C., Secs. 51-60) are the following:

"§ 51. **Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.**

Every common carrier by railroad while engaging in commerce between any of the several States, * * *, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * *, for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, * * *" (Sec. 1 of the Act).

"§ 55. **Contract, rule, regulation, or device exempting from liability; set-off.**

Any contract, rule, regulation or device whatsoever the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: * * *" (Enacted Apr. 22, 1908, as Sec. 5 of original Act).

"§ 56. **Actions; limitation; concurrent jurisdiction of courts; removal of case in State Court.**

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of

the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of the commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States'' (Second paragraph added to Sec. 6 of the Act by amendment Apr. 5, 1910, 36 Stat. 291).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 177.

THE PENNSYLVANIA RAILROAD COMPANY,

Petitioner,

—against—

CLYDE W. KRENGER,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN OPPOSITION.

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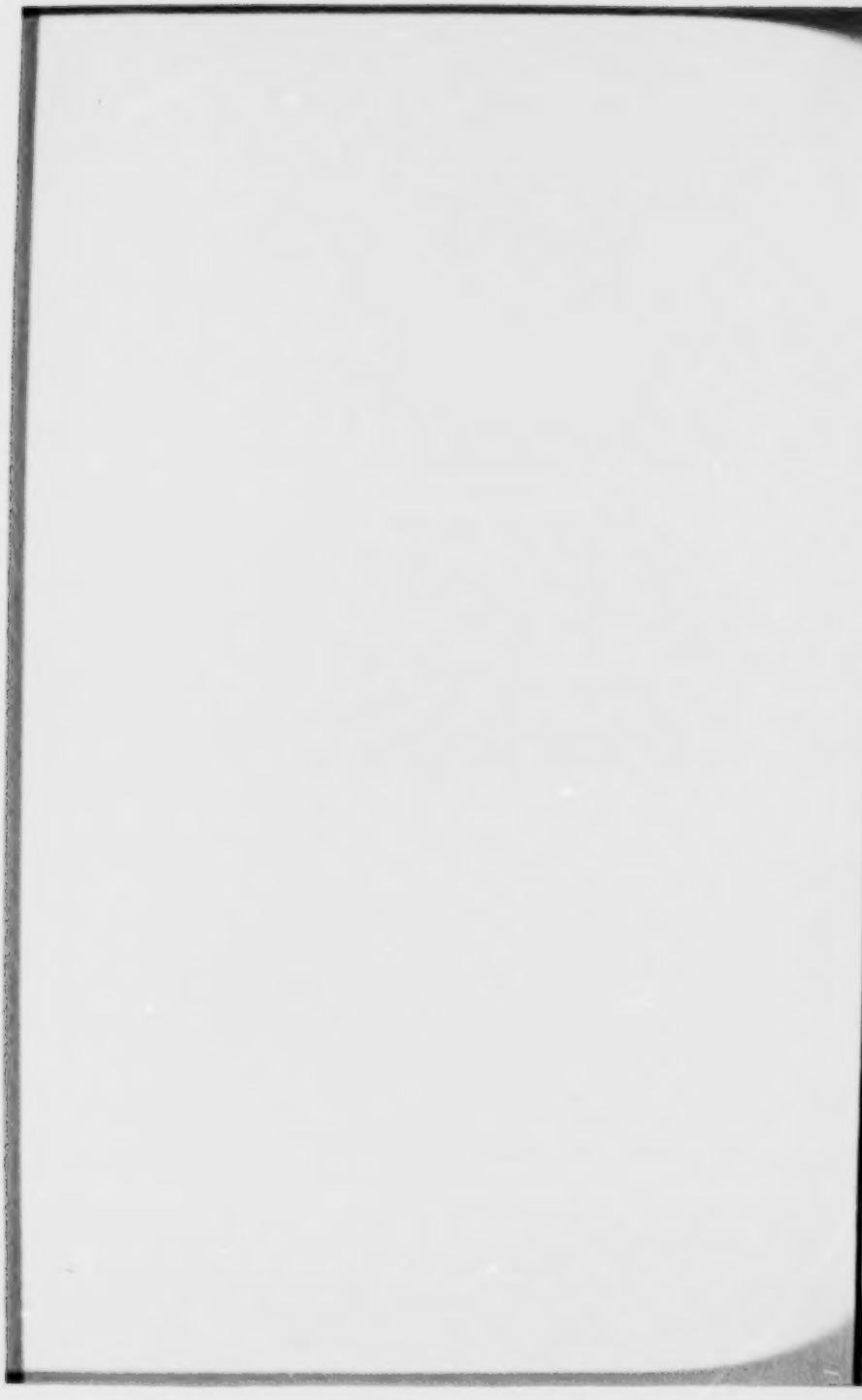

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 177.

THE PENNSYLVANIA RAILROAD COMPANY,

Petitioner,

—against—

CLYDE W. KRENGER,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

Statement of Facts.

On April 14th, 1949, the United States Court of Appeals, Second Circuit, by a divided bench affirmed a judgment recovered by Clyde W. Krenger, plaintiff employee, hereinafter referred to as respondent, against The Pennsylvania Railroad Company, defendant, respondent's employer, hereinafter referred to as petitioner, in an action to recover damages for personal injuries sustained by respondent, after a trial before Inch, *D. J.*, and a jury in the United States District Court for the Eastern District of New York. The action was instituted under the Federal Employers' Liability Act (45 U. S. C. A., Sections 51-59) and the Federal Safety Appliance Act (45 U. S. C. A., Section 11), by respondent against petitioner to recover damages for injuries suffered by respondent on March

10th, 1946, because of the negligence of petitioner and its employees while the parties to this action were concededly engaged in interstate commerce (R. 23).

Respondent, age 40 at the time of this accident, was married, and the father of three minor children, and a resident of the State of Ohio. He sustained severe and permanent personal injuries,[1] at Akron, Ohio, on March 10th, 1946, while employed as a yard conductor by the petitioner, a corporation of the Commonwealth of Pennsylvania.

While in this injured condition and during the time that he was impoverished, disabled and under medical care resulting therefrom, and not having received any wages in the interim, petitioner on or about May 10, 1946, loaned or advanced to respondent the sum of $250 under an agreement (Petitioner's Exhibit A, R. 25, 413), by which respondent covenanted and agreed that he would not institute or prosecute any suit against the petitioner for damages for his injuries except in one of the courts, State or Federal, sitting in the State where his injuries were sustained or [2]*in the State within which he (the employee) resided at the time of the accident*[3] provided that service could

---

[1] See Medical testimony of Dr. Milgram, respondent's physician (R. 169, 172, 173, 174, 176-187). Medical testimony of petitioner's physicians, Drs. Kropf, Holston and Spaulding (R. 133, 136, 138, 142, 144, 145, 285, 289, 291, 292, 334, 336).

[2] Unless otherwise indicated, italics throughout this brief are the writer's.

[3] This privilege bestowed upon respondent by petitioner is sufficiently startling to cause raised eyebrows, for, Title 45 U. S. C. A., Sec. 56, entitled *actions; limitations; concurrent jurisdictions of courts;* dealing with the rights of railroad employees to institute litigation under circumstances as prevail here do *not* give unto the *employee* the right to sue in the *State of his residence at the time of the occurrence of accident.* The appropriate portion relating thereto reads "* * *, in the district of the residence of the *defendant* or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."

be had upon the petitioner in either of those States. The said sum and such additional sums as might be advanced were to be retained by the respondent, but if an action should be brought they were to be *deducted* from or *credited* on any amount finally allowed in settlement or by judgment.

Thereafter from time to time additional *loans or advances* under identical agreements were made until they aggregated $1,750 (R. 20, 21, 109).

Subsequently, respondent caused a summons and complaint to be served upon petitioner in New York and instituted this action in the United States District Court for the Eastern District of New York under the provisions of the Federal Employers' Liability Act (R. 4, 5).

In its answer, among other things, petitioner in Paragraphs IV to VIII, inclusive, alleged the foregoing agreement and the here questioned consideration therefor. It further alleged that the respondent resided and continued to reside in the State of Ohio, that the accident occurred at the South Akron yard operated by petitioner railroad in Akron, Ohio, and that petitioner could be served with process in that State (R. 6, 7).

When the case was called for trial on December 16th, 1947, before Hon. Leo F. Rayfiel, respondent moved:

> "* * * to strike Paragraphs IV to VIII, inclusive, from this defendant's answer upon the ground that that separate defense does not state facts sufficient to constitute a defense at law, and upon the further ground that the defenses sought to be alleged in those paragraphs of the answer are void for the reason that the agreement

(Respondent's Exhibit A, R. 413) referred to in the answer as having been entered into between the plaintiff and the defendant pursuant to which the plaintiff agreed to waive his judicial rights with respect to venue contravenes the provisions of the Federal Employers' Liability Act, Sections 55 and 56" (R. 24).

The District Court below, in granting respondent's motion (R. 27, 415, 416) and commenting upon Section 55, appropriately stated:

> "The defendant bases its position on the hypothesis that the question of venue *is not such a liability as was contemplated or intended in the enactment of the said section.*
>
> * * * *
>
> "It is my belief that the decision and the opinion of Judge Barnes in the case of *Sherman* v. *Pere Marquette Railway Company, supra* (62 F. Supp. 590), is consonant with the *intent* of Congress to provide by Section 55 of the Federal Employers' Liability Act *adequate and complete safeguards for the railroad employee against such an impairment of his rights as the aforementioned agreement might effect.* The right to prosecute this action in this district *is an important and valuable right,* the denial of which would contravene both the letter and the spirit of Section 55. It appears to me that recourse may be had *to legislation alone* for the correction of such inconveniences and hardships as the statute may entail."

Each of the three judges of the United States Court of Appeals bench filed separate opinions in this case.

Clark, *C. J.*, wrote the majority opinion (R. 421-427); L. Hand, *C. J.*, wrote a concurring opinion (R. 427-430); and Swan, *C. J.*, wrote a one-half page dissenting opinion (R. 430).

Had the United States Court of Appeals withheld its decision and its opinions until after June 6th, 1949, there is very little doubt but that the affirmance would have been unanimous, for on that day this Court in *Boyd* v. *Grand Trunk Western Railroad Company*, 69 Sup. Ct. 1166, granted a petition for a writ of certiorari in favor of Boyd, the petitioner, where this Court was then presented with the identical proposition involved in the instant case, namely:

> Was the contract (Petitioner's Exhibit A, R. 413) entered into between petitioner and respondent in the circumstances of this case, void under Section 55 of the Federal Employers' Liability Act (45 U. S. C. A.), for the reason that its effect was to enable petitioner to exempt itself from a liability created by Section 56 of the Act?

Prior thereto the Supreme Court of Michigan ruled such contract to be a valid one in *Grand Trunk Western Railroad Company* v. *Boyd*, 321 Mich. 693.

Significant, therefore, become the first five lines of Judge Swan's brief dissenting opinion wherein he stated:

> "I should prefer to withhold decision to await action by the Supreme Court in *Grand Trunk Western R. Co.* v. *Boyd*, 321 Mich. 693,[4] petition

[4] Should have read, *Boyd* v. *Grand Trunk Western R. Co.*, for Boyd was the petitioner seeking the writ in that proceeding.

for certiorari pending. But as my brothers wish to decide the case without delay I will state briefly my decision" (R. 430).

The writer is, therefore, inclined to the inescapable conclusion that Judge Swan would have concurred with Judges Clark and L. Hand in affirming the District Court judgment below had he but the foresight to anticipate that this Court was about to grant a writ in the *Boyd* case.

Opinions Below.

Respondent accepts as correct the statement contained in the petition under this heading reflected at pages 1 and 2.

Jurisdiction.

Respondent further agrees with the statement contained at page 2 labeled "Jurisdiction", but does not believe that this Court should exercise its judicial discretion to review in this case because in the writer's humble opinion this case does not come within the purview of the language of Rule 38 (5) (5b) of the Rules of the Supreme Court. More concerning this point is reflected at pages 9-12 hereof.

Questions Presented.

Under this heading, petitioner poses questions 1, 2, and 3 at pages 2 and 3. Respondent agrees that questions 1 and 2 are proper, to the extent however,

that should this Court decide that the "Advancement of Funds" agreement (R. 413) is rendered void under Sections 55 and 56 of the Federal Employers' Liability Act (45 U. S. C. A.), then questions 2 and 3 become academic and the writ sought should be denied. Respondent does not agree that "two of the three judges of the United States Court of Appeals held that the contract was not so rendered void by the Act".

Statute Involved.

Respondent accepts as correct petitioner's statement concerning the "Statute Involved" appearing at page 3 of its petition.

Statement.

Under this heading at pages 3 to 6 of the petition, the facts are properly outlined except that respondent does not agree that Judge Learned Hand ruled that Section 5 of the Act did not bar such contracts, as reiterated at page 6 of the petition. In fact it would appear that among the many reasons advanced by Judge Hand for an affirmance of the judgment below he actually concurred with Judge Clark in the view that Section 5 of the Federal Employers' Liability Act does apply to contracts of this nature. That Judge Clark recognized this accord is most evident from that part of his majority opinion wherein he stated (R. 427):

> "As my brother's opinion shows, the fact of the prohibition embodied in §5 looms large in his result, * * *. It does seem that I am placing some-

what more weight upon that prohibition than he, though how much I am not sure; * * *."

This fact is further corroborated when reference is made to the following statements appearing in Judge Hand's opinion, reading (R. 428):

"* * * the contract did 'exempt,' and wholly 'exempt,' the road from 'liability'; for, as matters stood, it had relieved the road from any compulsion to pay damages. It is true that the employee had it within his power to revive the 'liability' by repaying the advance, but that is irrelevant; *section 5 does not permit such a release whether absolute or conditional.*"

Further corroboration is evident from an examination of that part of Judge Hand's opinion, reading (R. 429, 430):

"The Federal Employers' Liability Act bears evidence that in the eyes of Congress employees do not bargain in all respects as equals with the roads. It relieves them of the defense of assumption of risk; §6 gives them a larger choice of forums than at that time was open to other plaintiffs; and *§5 impairs some of their contracts.*

* * * *

* * * three considerations conspire to take them (such contracts) outside what was decided in *Callen* v. *Pennsylvania R. R. Co., supra* (332 U. S. 625): (1) they are contracts of a kind at which courts have always looked askance; (2) they concern a matter as to which—in some respects at any rate—Congress has shown that it considered the employee to bargain at a disadvantage; (3)

that disadvantage is in this instance especially marked and is without any corresponding benefit."

Significant moreover, is the theory advanced by Judge Hand that such contracts are in fact against public policy, on which subject he cogently commented (R. 428):

> "On the other hand, be the original reasons good or bad, courts have for long looked with strong disfavor upon contracts by which a party surrenders resort to any forum which was lawfully open to him."

Specification of Errors To Be Urged.

The "Specification of Errors To Be Urged" are properly outlined at pages 6 and 7 of the petitioner's brief but respondent humbly believes that the Court of Appeals for the Second Circuit did not err as to any of the four points there set forth. Moreover, respondent respectfully contends that if this Court should decide that no error was commited as to the first and third specification of errors urged, then specification two and four become academic and the writ should therefore be denied.

Reasons for Granting the Writ.

Under this heading appearing at pages 7, 9 and 10, petitioner contends that:

> "I. The Court of Appeals has decided important questions of federal law which have not

been but should be settled by this Court; II. There is a sharp conflict in judicial opinion with respect to the validity of such contracts which ought to be resolved by this Court; III. The Court of Appeals has decided federal questions in a way probably in conflict with applicable decisions of this Court."

Reference, however, to Rules 38 (5) (5b) of the Supreme Court reveal that:

"A review on writ of certiorari is *not* a matter of right, but of *sound judicial discretion,* and will be granted *only where there are special and important reasons therefor.* The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

Where a circuit court of appeals has rendered a decision in conflict with the decision of *another circuit court of appeals on the same matter;*[3] or

[3] Presumably petitioner is of the opinion that this portion of the Rules of the Supreme Court covers Point II of its petition elaborated on at pages 9 and 10. Respondent, however, contends that petitioner's Point II is at substantial variance with this portion of the Rules because exhaustive legal research on the subject of the validity or non-validity of the specific contract involved herein reveals that this question has been passed upon by but two federal courts of appeals and that both such courts have held such contracts to be void under the provisions of the Federal Employers' Liability Act, 45 U. S. C. A. 55; *Akerly* v. *New York Cent. R. Co.*, 168 F. (2d) 812, 6th Circuit, Ohio, and the 2nd Circuit, New York, in the instant case, not yet reported (R. 421-430, 455-457). Why then should petitioner call upon this court to review on a writ of certiorari this question *not* in conflict with any decision of any other federal court of appeals?

> has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; * * *."[6]

On pages 11, 12 and 14 which also dwell on the "Reasons for Granting the Writ", and page 19 of its brief, it is contended by petitioner that the decision of the Court of Appeals for the Second Circuit, in the instant case, is probably in conflict with an applicable decision of this Court, namely, *Callen* v. *Pennsylvania Railroad Co.*, 332 U. S. 625. On that score therefore the language distinguishing that case from the instant one as contained in the opinions of Judges Clark and L. Hand become significant, reading:

> "We are met at the outset with the claim that the agreement in question is a valid compromise of plaintiff's claim for damages, and is therefore a complete bar to his action. *Callen* v. *Pennsylvania R. Co.*, 332 U. S. 625. But in *Duncan* v. *Thompson*, 315 U. S. 1, 7, that contention was rejected as to an advance made after the accident in consideration of an agreement not to sue until the advance was repaid" (R. 423).

* * * *

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[6] It is again assumed that petitioner believes its Points I and III delved into at pages 7-9 and 10-12 of its petition and pages 18-21 of its brief, come within the purview of this portion of the Rules. Respondent, however, contends that these points do not warrant this Court's exercise of its right to review on a writ of certiorari because this Court has not only previously passed upon the question here presented, but has in addition supported respondent's contention that contracts of this nature prepared by railroads may *not* be enforced and do violate Sections 55 and 56 of the Federal Employers' Liability Act, 45 U. S. C. A.; *Duncan* v. *Thompson*, 315 U. S. 1, 86 L. Ed. 575 (1942); Second Employers' Liability Cases, 32 S. Ct. 169, 223 U. S. 1, 56 L. Ed. 327.

"I do not forget in *Callen* v. *Pennsylvania R. R. Co.*, 332 U. S. 625, the court held that an employee was not in so unequal a bargaining position that —in the absence of some positive provision of law—he could not settle his claim in full; and if he may do that, it would seem at first blush that he may surrender one of the privileges by which the claim is protected. Yet the differences seem to me critical. Although the employee is ordinarily not qualified to estimate his chances of success in a suit against the road, it is desirable that he shall be able to collect his claims without suit. On the other hand in contracts like that at bar the payment not only does not settle the claim, but it has no relation to any value at which the employee may appraise it, not even after he has discounted it by the hazzards of a suit. It is no more than a temporary relief of his immediate necessities, which must be credited upon any recovery or settlement. Moreover, he is at a much greater disadvantage in estimating the effect of the contract upon his rights, than when he settles the claim. He is likely to suppose that one court is like another; and certainly he cannot be deemed to be acquainted with those differences between them which may in fact vitally affect his recovery" (R. 429).

Respondent, at the risk of repetition, does not subscribe to petitioner's contention IV appearing at pages 12 and 13 as part of its "Reasons for Granting the Writ", wherein it is claimed that a majority of the judges of the Court of Appeals disagreed with the decision of the District Court as to the interpretation of Section 5 of the Act as applied to the "Advance-

ment of Funds" agreement here involved. As pointed out previously herein, Judge Swan might very well have concurred with Judges Clark and L. Hand had the decision of the Court of Appeals been held in abeyance until this Court had passed upon the application for the writ of certiorari in the *Boyd* case on June 6th, 1949. Petitioner's contention that Judge Hand's opinion is also probably in conflict with the decision of this Court in *Fountain* v. *Filson*, 336 U. S. 681, is fallacious. In that case an order was made on an appeal to a federal court of appeals on a new issue as to which the opposite party had no opportunity to present a defense before the trial court and therefore this Court reversed. In the instant case, however, it clearly appears, both from the record and Judge Hand's opinion of May 25th, 1949, on petitioner's application for rehearing to the Court of Appeals below, that the facts are entirely different. When this case was *actually called for trial*, respondent moved to strike Paragraphs IV to VIII from the defendant's answer dealing with the contract or agreement (R. 413) in question (R. 24), at which time, petitioner merely offered in evidence the said contract without submitting any proof regarding the circumstances of the signing thereof, more particularly with respect to whether or not respondent had any knowledge or understanding of the legal meaning of the contents thereof, whereupon the District Court below granted respondent's motion (R. 25-27).

That Judge Hand considered this *failure of proof* on petitioner's part in aiding the Court to arrive at

its concurring opinion is evident when he aptly remarked (R. 455, 456):

> "Upon petition for rehearing the defendant asserts that it has been deprived of any opportunity to present the evidence which I held to be necessary to make the contract valid. * * *. The defendant moved to have the validity of its defence that the contract was a bar decided in advance of the trial, and this was granted. When the issue came on before a judge, the plaintiff moved to strike out the defence and the defendant put in evidence the contract, *but nothing more.* The judge thereupon struck out the defence.
>
> As I said in my concurring opinion, I think that the contract was invalid unless the defendant affirmatively proved that it was executed after the employee was fully advised of its 'effect upon his rights'. It was part of the defendant's case therefore, when the plaintiff moved to strike out its defence, to prove these facts, and *it did not even attempt to do so.* * * *. Moreover, the defendant does not even now allege what alone would satisfy me: *i. e.*, that the plaintiff had had the advice of someone who adequately informed him of the effect of the contract upon his rights. Certainly that person must be someone not in the defendant's employ; and, indeed, I am inclined to say that he must be a lawyer, though I should not wish to make that an inflexible condition."

In the instant case therefore petitioner had ample opportunity to submit proof whereas in the *Fountain* case the appealing party never had such opportunity.

CONCLUSION.

The Court of Appeals for the Second Circuit, correctly affirmed the decision of the District Court which held that the contract in question violated Section 55 of the Act, and the petition for a writ of certiorari should, therefore, be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 177.

THE PENNSYLVANIA RAILROAD COMPANY,

Petitioner,

—against—

CLYDE W. KRENGER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ARGUMENT.

When a railroad employee is injured while engaged in interstate commerce his employer may not enforce a contract by the terms of which the employee agrees to file his action for damages only in the state where his injuries were sustained, or where he resided at the time he sustained such injuries.

Respondent contends that this agreement was void under Section 55 of the Federal Employers' Liability Act. This section is so broad and sweeping in its terms that it prohibits *any contracts* by the terms of which railroads may seek to limit or reduce their liability or impair *in any way* the rights of their employees, when it states:

"*Any contract,* rule, regulation, or device what-

> soever, the purpose or intent of which shall be to enable any common carrier to exempt itself from *any liability* created by this *chapter,* shall to that extent be void * * *" (45 U. S. C. A. 55).

The words "any liability created by this chapter" is not the same as saying "any liability created by Section 1 of the Act". Congress, in the enactment of the law created a new liability and substituted it for the existing liability at the common law. That new liability is the composite of all of the separate provisions of the Act. If one element of that liability can be destroyed by a contract such as is here involved, all can be destroyed. The successive destruction by means of such a contract of the elements of that liability, would, like the successive pulling down of the pillars of a temple, destroy the entire structure erected by Congress and strengthened and perfected by amendments over the period of approximately forty years that have elapsed since the law was passed.

One of the vital elements of that liability is the right of the railroad employee to select the forum in which to bring his suit, as provided in Section 56. The comprehensive language of Section 55 outlaws *any contract,* the effect of which is to destroy the right to freely choose such a forum, and it is therefore void under that provision.

It is respondent's contention that "any liability created by this chapter" means just what it says and that the comprehensive language of Section 55 was deliberately chosen by Congress to preserve the status of the employee at the level fixed by the aggregate of the Act's provisions. The status given to him by the Act in its entirety, was designed to place him as nearly as possible on an equal footing with his powerful employer in the matter of claims for injuries or death arising out of his employment, as a result of

the employer's negligence, both in bargaining for settlement and in securing a judgment in court, where suit becomes necessary. It was intended by Congress that that position of equality should not be bartered away, either altogether or in piecemeal fashion, by the employee in a moment of dire necessity, as respondent was induced to do in this case. The powerful employer must be made to understand that when it attempts to induce the necessitous employee to forego any of the privileges or immunities given to him in the Act, for some tentative advantage such as $250 or in fact any sum of money, with which to purchase the necessities of life, while recovering from his serious injuries, it bargains with the employee, armored with every protecting provision of the Act.

The privilege of selecting a forum at any place where his employer is carrying on its business *is one of those protecting provisions* and comes within the meaning of the words "any liability created by this chapter".

It would be extremely difficult to imagine or select any phraseology more inclusive in its scope. By the word *contract* with which we are here dealing it was sought by petitioner to deprive respondent of his right to file his action in the courts of New York, Illinois, etc.; and to limit him to the courts of Ohio only.

This issue has come before a number of District Judges and State Courts and the results and opinions have been divergent. Some of the courts have held that such contracts are valid. Others, however, with whose reasoning the writer is naturally in accord, have held such an agreement to be void. The latter decisions viewed realistically take the position that contracts the type of which we are presently dealing with limit to a very great extent the *liability* of the railroads and therefore such contracts are *void*. Not

until June 14, 1948 did a question involving this precise type of contract come before any Circuit Court of Appeals. On that date the case of *Akerly* v. *New York Cent. R. Co.*, 168 F. (2d) 812, was decided by the Circuit Court of Appeals, 6th Circuit, in the State of Ohio, which held that such contracts are *absolutely void*. Subsequent thereto and on April 14, 1949 the Court of Appeals for the Second Circuit made a similar finding in the instant case (R. 431). More concerning the *Akerly* case and the other decisions relating to this question will be discussed later.

Before dealing with the cases and other authorities, the writer desires to focus this Court's attention on the history of the Federal Employers' Liability Act in the belief that such history will help make clear the meaning and significance of Section 55 with which we are here concerned.

The Safety Appliance Act was signed by President Harrison and became law on or about March 2, 1893.[7] The dreadful toll of deaths and injuries of railroad employees, however, continued and created such a public scandal that President Theodore Roosevelt paid particular note to the imperative need of further legislation for the protection of such employees. So came about the enactment by Congress in 1906 of the first Employers' Liability Act.[8] This Act was thereafter held to be unconstitutional.[9]

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[7] The Safety Appliance Act, March 2, 1893, c. 196, 27 Stat. at L. 531, U. S. Comp. Stat. 1901, p. 3174, as amended April 1, 1896, 29 Stat. at L. 85, c. 87, and March 2, 1903, 32 Stat. at L. 943, c. 976, U. S. Comp. Stat. Supp. 1907, p. 885.

[8] Chapter 3073. Act Relating to Liability of Common Carriers in the District of Columbia and Territories and Common Carriers Engaged in Commerce between the States and between the States and Foreign Nations and Their Employees.

[9] Employers' Liability Cases (*Howard* v. *Illinois Central RR. Co.*), 207 U. S. 463, 52 L. Ed. 297, Jan. 6, 1908.

Immediately following this decision, President Theodore Roosevelt sent a special message to Congress requesting immediate enactment of a new Employers' Liability Act which *would be* Constitutional under the rules laid down by the Supreme Court. Among other things, he said:[10]

> "It is to be observed that an employers liability law does not really mean muleting employers in damages. It merely throws upon the employer the burden of accident insurance against injuries which are sure to occur. It requires him either to bear or distribute through insurance the loss which can readily be borne when distributed, but which, if undistributed, *bears with frightful hardships upon the unfortunate victim of accident.*"

Under the immense pressure thus created, Congress responded, and the Second Employers' Liability Act was enacted and approved on April 22, 1908, held to be Constitutional by this Court, January 15, 1912.[11]

Section 5 contained therein the identical verbiage as appears in 45 U. S. C. A. 55. Venue at that time was controlled by the general federal venue provisions[12] which merely gave the injured employee the right to institute his action in, *and only in,* the district of which his employer was a resident.

This limitation was considered a great handicap to

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[10] Messages and Papers of the Presidents, Vol. 15, p. 7127, Jan. 31, 1908.

[11] 35 Stat. at L. 65, c. 149, U. S. Comp. Stat. Supp. 1909, p. 1171, and the amendment of April 5, 1910, 36 Stat. at L. 291, c. 143, Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327.

[12] 28 U. S. C. A. 112 (Judicial Code, Sec. 51).

the usefulness of the law in compelling railroads to take effective action for the safety of their employees and in 1910 Congress recognized that injured employees should be granted much wider latitude in the selection of the courts in which to institute their litigation and so Section 6 (45 U. S. C. A. 56) was amended to give to the injured railroad employee a three-fold choice of venue which has remained in the Act ever since.[13]

Obviously this was done by Congress in the belief that the hazards of railroading could be *substantially lessened* if the railroads could thus be made to realize the expensiveness of their indifference to their employees' safety.

It should moreover be noted that the final three-fold choice of a forum, as enacted in Section 6 (45 U. S. C. A. 56), was not determined until after considerable debate. The Congressional Record shows that the original 1910 proposed amendment provided a *four-fold* choice of venue reading as follows:

> "The district of the residence of *either* the *plaintiff* or the defendant, or in which the cause of action arose, or in which the defendant shall be found at the time of commencing the action."[14]

This was a *four-fold* choice and was finally determined to be too broad. The permission to sue in the district of the *residence of the plaintiff* was therefore eliminated and the section was finally legislated and approved to provide a *three-fold choice* in which form it has ever since remained.

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[13] Apr. 5, 1910, c. 143, Sec. 1, 36 Stat. 291; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, Sec. 2, 52 Stat. 1404.

[14] 45 Cong. Rec. 61st Cong., 2nd Sess., Part 3, p. 2253.

Much of this historical background is set forth in *B. & O. R. R. Co.* v. *Kepner,* 314 U. S. 44, 86 L. Ed. 28, in which this Court held that the venue provisions of Section 6 (45 U. S. C. A. 56) are mandatory in nature and it is therefore impossible for a State Court, regardless of its equity powers, to enjoin filing and prosecution of a case in a district *far remote from the scene of the accident.*

In that case Mr. Justice Reed appropriately stated at page 54:

> "* * * When the section was enacted it filled the entire field of venue in federal courts. A privilege of venue granted by the legislative body which created this right of action cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, *the remedy is legislative, a course followed in securing the amendment* of April 5, 1910, for the benefit of employees. This Court held in *Hoffman* v. *State of Missouri ex rel. Foraker,* 274 U. S. 21, 47 S. Ct. 485, 71 L. Ed. 905, that the burden on interstate commerce *would be disregarded where the carrier had lines in the distant state.* The importance of unhampered commerce is at least as great as that of a carrier's freedom from harassing incidents of litigation. *Whatever burden there is here upon the railroad because of inconvenience or cost does not outweigh the plain grant of privilege for suit in New York.*"

As Senator Borah said in explaining the salutary and desirable features of the bill which embody the amendments, it:

"enabled the plaintiff to find the corporation *at*

> *any point or place or state* where it is actually carrying on business and there lodge his action if he chooses to do so."[13]

This 1910 amendment was not, as is obvious from the foregoing, enacted thoughtlessly nor without a clear determination to give to a plaintiff a liberal choice of forums in which to bring his suit. To put it very simply and directly, it is quite apparent that Congress concluded that such a wide choice on the question of forums was desirable in order to *equalize* to some degree the immense differences in financial resources between the impoverished and injured employee or his next of kin and the financially powerful employer.

As was said on December 23, 1946, by the Supreme Court of Utah in the case of *Peterson* v. *Ogden Union Ry. Co.*, 175 Pac. (2d) 744, on page 747:

> "Section 6 (45 U. S. C. A. sec. 56) makes available to the plaintiff several courts in which he may bring the action. Clearly that section gives the employee *substantial benefits*. It was not only for his convenience and to enable him to choose a court where the expense of litigation would not be prohibitive, but it was to give him the right to *select the court in which he considers it would be most advantageous for him to bring his action.*"

That case dealt with the same type of contract involved in the instant case.

This in brief is the historical background of the law which the petitioner here seeks to defeat by the pres-

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[13] 45 Cong. Rec. 61st Cong., 2nd Sess., Part 3, p. 2253.

ent contract with a permanently injured and impoverished employee.

As heretofore indicated, although this question has been passed upon with divergent views by many district judges in different jurisdictions, no Circuit Court of Appeals had this precise question before it until June 14th, 1948 when the case of *Akerly* v. *New York Cent. R. Co.*, 168 F. 2d 812, reached the Circuit Court of Appeals, 6th Circuit (Ohio) which reversed its lower Court, where Allen, Circuit Judge, aptly remarked at pages 814, 815:

> "* * * Section 6 creates new and important rights in the employee and it created corresponding *liabilities against the employer*. Appellee argues that liability, within the meaning of the Act, is the determination of the *obligation* of the appellee to *pay damages*, and that it is in no way affected by the place or forum of trial. But liability is an *ordinary* word, to be construed according to its *ordinary meaning*. The second, and more limited definition of the words, as found in Webster's Unabridged Dictionary (2d ed.), 1935, is in substance that urged by the appellee; but the first, and more inclusive definition is 'The state or quality of being liable.' Liable, in turn, is defined as being 'bound or obliged in law or equity; responsible; * * * answerable or exposed *to a certain contingency or casualty of an undesired character*.' Within these definitions, the appellee was liable under §6 of the Act *to be sued* in any one of three jurisdictions: that of its residence, that where the accident occurred, that where it does business. In fact this new venue statute creates, *within the ordinary meaning of*

> *the word,* liability against the employer in states and districts, *where he could not have been sued prior to the amendment.* The paragraph is broad and sweeping, and as pointed out in *Duncan* v. *Thompson,* 315 U. S. 1, 62 S. Ct. 422, 424, 86 L. Ed. 575, the adoption of the section in its present form 'argues persuasively that Congress wanted Section 5 *to have the full effect that its comprehensive phraseology implies.*' * * *.
>
> We think that the inclusion of this section in the Employers' Liability Act, with its creation of *new obligations against the employer,* makes the venue provisions an *inherent part of the employer's liability.* An attempt to limit it by contract is an attempt *to exempt the railroad from liability, and is void.*"

That the petitioner also interpreted this section as creating a liability on its part of being sued in New York and elsewhere, is clearly apparent else why did it apply such meticulous care in preparing a contract of this nature for its injured employee to sign, knowing full well that at the time of its execution respondent was not only seriously injured and under medical care but not receiving wages during the time of his disability.

As was further stated by the Circuit Court in the *Akerly* case, the facts of which are identical to the instant one (p. 814):

> "Under the conceded facts, it is a fair *inference* that the appellee (railroad) regarded this contract as important for the sake of exempting itself *from the liability of being sued in New York, the state of its residence, or in any of the states, other than Pennsylvania, where it does business.*"

The Court of Appeals for the Second Circuit in the instant case supported these interpretations when, in the majority opinion of Judge Clark, it appropriately held:

> "* * *. *Duncan* v. *Thompson, supra,* (315 U. S. 1) has established that contracts made after the injury are within the scope of § 5; and it specifically voided the condition precedent to suit of returning the money advanced. We agree with the majority view in *Akerly* v. *New York Cent. R. Co., supra* (168 F. 2d 812) that the sweeping language of the Act, its legislative history, and the interpretation of the provision thus made—all support the plaintiff's contention.
>
> Significance should be attached to the inclusive nature of the statutory phrase—'*any liability under this chapter.*' Had a restricted meaning been intended, it would surely have been simple, indeed, to limit the statutory provision to the duty *to pay damages.* That could have been done by this precise, though natural, phrase, or indeed by descriptions used in other parts of the Act, such as the 'right of action' of § 59 or even the 'cause of action' of § 56. On the other hand, it is difficult to think what liability under this chapter, and beyond the main grant of § 1, could have been intended if this was not, or what more apt expression to cover it, together with all other duties, liabilities, and disabilities created by the Act, could have been chosen. The importance of this extensive choice of venue to injured railroad workers is no secret; it was fully set forth by Senator Borah in sponsoring the amendment of 1910 which granted the choice—a bit of legislative history recently recounted at length in decisions

re-enforcing the option against suggested judicial limitation. *Baltimore & O. R. Co.* v. *Kepner*, 314 U. S. 44, 136 A. L. R. 1222; *Miles* v. *Illinois Cent. R. Co.*, 315 U. S. 698, 146 A. L. R. 1104. Of course if we cut through dialectic to reality—a la Mr. Justice Jackson in the latter case, 315 U. S. at pp. 705-708—we know that its greatest importance is because of its hoped-for consequence upon the amount of recovery through suit in a district where juries are generous. But we need not resort to an operation so drastic. For the views of cases and scholars—not to speak of the preferred dictionary definition relied on by Judge Allen in the *Akerly* case, *supra*—are quite ample to sustain this meaning of 'liability' even apart from the special setting of the statutory phrase in its immediate context. Under the analysis of Professor Hohfeld, adopted by the American Law Institute, *liability* is quite differentiated from a mere duty to pay damages and serves as the correlative of *power* and the opposite of *immunity* or exemption. Thus the railroad was contracting against its liability to be sued, *i. e.*, to have its legal relations changed—adversely—in any one of several jurisdictions, in order to obtain immunity from such change except under the favoring conditions of a single chosen jurisdiction. Hohfeld, *Fundamental Legal Conceptions* 8, 50, 58-60, 1923, citing and quoting judicial usage; Corbin, *Legal Analysis and Terminology*, 29 Yale L. J. 163, 169, 170; 1 Restatement, Property § 3, comment a and Special Note, 1936. * * *.

* * *. And, indeed, any possibility that the statutory phrase could be limited to the duty to

pay damages only would seem already foreclosed by *Duncan* v. *Thompson, supra.* That case, it will be recalled, held invalid an agreement requiring the repayment of sums advanced as a *condition precedent* to the bringing of action. If the statutory phrase applies to a condition requiring fulfillment *before* an action may be brought, it would seem just as applicable to a condition as to the *place where* action must be brought. * * *.

* * *. Thus I accept the view that these are contracts of a kind generally to be viewed critically unless they are to be taken as parts of a fair compromise between the parties. 6 Williston on Contracts § 1725, Rev. Ed. 1938; 2 Restatement, Contracts § 558, 1932" (R. 424-426, italics the Court's).

The writer believes that only one case excepting the recent *Boyd* case, involving a somewhat similar agreement has reached this Court. That is the case of *Duncan* v. *Thompson,* 315 U. S. 1, 86 L. Ed. 575 (1942), where a railroad advanced to one of its injured employees the sum of $600 *for living* and other expenses just as in our case at bar. In that case the agreement, however, contained the provision that plaintiff would repay the advance before filing any lawsuit.

In the instant case the agreement was that the respondent employee would only file his lawsuit in the courts of one particular state, namely, Pennsylvania.

In violation of that agreement the plaintiff in the *Duncan* case filed his action in Missouri *without* repaying the advance. The Trial Court, however, refused to dismiss the case and there was judgment entered in plaintiff's favor. The higher State courts in

Missouri held however, that the agreement was valid, and therefore entered judgment in favor of the railroad.

This Court unanimously reversed that judgment holding that the covenant not to file suit until the advance payment was repaid was *void* under the provisions of *Section 5* of the Act. The Court reviewed the legislative and judicial history of this section and through Mr. Justice Black appropriately held, page 6:

> "* * *. Under the state acts there had been widespread attempts by employers to contract themselves out of the liabilities the acts were intended to impose. State legislatures had responded to this practice by adopting provisions which proscribed employer-employee agreements intended to deprive employees of the statutory benefits. These provisions varied in scope and language. Some declared agreements attempting to exempt employers from liability void only when they were part of contracts of employment. One state, although not limiting the statutory invalidation to contracts of employment, specifically restricted it to agreements 'entered into prior to the injury.' Other states, presumably after experience had shown that narrower limitations were *inadequate to stamp out ingenious evasions of* the statutory responsibilities, adopted measures invalidating agreements *of any type*, regardless of when made, which attempted to exempt employers from liability. House Report No. 1386, 60th Cong., 1st Sess., pp. 30-75.
>
> * * *. And the adoption of Section 5 of the present act without adding any of the other limitations which some of the state statutes had em-

bodied argues persuasively that Congress wanted Section 5 to have the *full effect* that its comprehensive phraseology implies."

By that decision it is reasonable to assume that this Court was of the opinion that an agreement which compelled a plaintiff to *repay monies loaned or advanced* as a pre-requisite to filing an action constituted a substantial impairment of his rights, and that same was wholly void under Section 5.

The writer therefore inquires, if it is a substantial impairment of an injured and impoverished federal employee's rights to loan or advance him $600 and merely require repayment as a *condition precedent* to the filing of a lawsuit, by equally applied logic is it not a substantial impairment of his rights to *loan or advance* to him $250, $1,750 or even $17,500 on condition that he will renounce his right to file suit in all but one of the various states where Congress legislated prior thereto that he had a right to file in? In that connection is it not important to also consider that respondent's judgment by jury verdict in this case, was $28,750, a sum more than sixteen times greater than the amount loaned or advanced by petitioner to respondent?

To the same effect see the holding in *Sherman* v. *Pere Marquette Ry. Co.,* 62 F. Supp. 590, where Barnes, District Judge, who included in his discussion rights of federal employees with respect to Congressional legislated privileges bestowed on them, ably stated on page 593:

"Generally speaking, venue is a privilege which may be waived, *but it may not be contracted away in the face of a specific statute which prohibits*

> *such contracting,* as does Section 5 of the Employers' Liability Act under consideration.
>
> The court is of the opinion that the contracts in question in this suit are *void* because they are prohibited by Section 5 of the Federal Employers' Liability Act."

In that connection see also *Peterson* v. *Ogden Union Ry. Co.,* 175 Pac. (2d) 744, 747, *supra; Nunn* v. *Chicago, M., St. P. & Pac. R. Co.,* 71 F. Supp. 541.

Another case in which each and every section of the Federal Employers' Liability Act was examined into and discussed at great length, is *Fleming, et al.* v. *Husted,* 68 F. Supp. 900. In that case the railroad again set up as a defense an agreement similar in all respects to the one here involved. The injured employee in that action moved to dismiss on the ground that the contract in question was void, and in sustaining this contention Dewey, District Judge, appropriately held, on page 901:

> "Then next comes this fifth proposition which has to do with the statement that *any contract,* the purpose or intent of which would be to enable any common carrier to exempt itself from any liability created by this Chapter, shall be to that extent void. *Any liability* created by this Chapter! That, it seems to me, is the question—whether or not this is a contract attempting to exempt the carrier from *any liability* created by the Chapter.
>
> The sixth has to do with venue, which it seems to me is important in this case; because if there was only the *ordinary venue* which obtains in all actions between residents of different states, we

might have a different situation here. But the Act creates *an additional venue* to that in ordinary actions; and, as I remember it, one which is limited in cases of diversity of citizenship to the place of residence of the plaintiff or the defendant.

* * * *

What I am getting at is: If you limit this liability as contended for it could be only as to Section One of the Act. *I cannot believe* that Congress intended in Section Five of the Act to limit the contract, making it void, *to only Section One of the Act.* It is way down, in Section Five, in the Act itself. And where you limit liability of the venue only, still it is *a very important* right given by the Act to the plaintiff, which is sought to be limited in this case. And I cannot see why venue, *an additional venue* given to employees by the provisions of the Act, and which certainly creates *an additional legal right to the employees,* and—which necessarily follows—creates a *corresponding legal responsibility and obligation* on an employer, why the word 'liability' under Section Five of the Act does not include an attempt to limit *that obligation* or burden on the part of the employer just the same *as any other liability* under the Act or the entire Chapter.

It seems plain to me that Congress did *not* intend to limit the right to voiding a contract limiting liability under the Act to the liability under paragraph One of the Act, *but that it is on all the obligations created by the Act as against the employer; and I can not conscientiously determine and find that these contracts were valid contracts.* Venue is easy to be waived, we all know that is true; *but it has nothing to do with*

> *this case.* Here we have a statutory right created and broadened by the Act itself, and that statutory right creates *an additional obligation* on the part of the employer, and also brings with it the *prohibition* against entering into a contract to limit that right *as being void under section Five* of the Act, 45 U. S. C. A. §55."

See also

> *Tague* v. *Delaware L. & W. R. Co.*, 5 F. R. D. 323.

Further, on this subject see *Sherman* v. *Pere Marquette Ry. Co.*, 62 F. Supp. 590, where Judge Barnes held on page 593:

> "* * *. It has been said that the word 'liability' in Section 5 is limited to the liability of the carrier *to respond in damages,* but when we say that *we beg the real question,* which is as to the meaning of the word 'liability' in Section 5."

Congress by the adoption of the Federal Employers' Liability Act, unqualifiedly intended that the railroad employee should have the benefit of each and every provision of the *entire act.* It was not intended that an employee might contract away *or have the power* to so contract any portion of his rights thereunder. This intention is clearly evident from an examination of the *Second Employers' Liability Cases,* 32 S. Ct. 169, 223 U. S. 1, 56 L. Ed. 327, where Mr. Justice Van Devanter, very ably remarked, at page 176:

> "Next in order is the objection that the provision in § 5, declaring void any contract, rule, regulation, or device, the purpose or intent of which is to enable a carrier to exempt itself from

> the liability which the act creates, *is repugnant to the 5th Amendment to the Constitution as an unwarranted interference with the liberty of contract.* But of this it suffices to say, * * * that if Congress possesses the power to impose that liability, *which we here hold that it does,* it also possesses the power to insure its efficacy by *prohibiting any contract,* rule, regulation, or device *in evasion of it.*"

It is apparent therefore that the right of venue bestowed upon the railroad employee under the Federal Employers' Liability Act is different from that given by the general venue statute. The liability act must be considered *as a whole.* If a railroad were to be permitted, by contract with its employee, to vary *one provision* of the Act it might well by contract vary *all of the provisions* of the Act and thereby nullify it. A railroad employee may therefore not lightly be deprived of the venue rights acquired by him as a result of the promulgation of the Federal Employers' Liability Act.

The agreement in the instant case, as all other similar agreements interposed by railroads after their employees suffered injuries in furtherance of Interstate Commerce, lacks consideration. The advances made to respondent were not in the nature of a payment *but only a loan.* The money which the petitioner turned over to respondent was an *advancement* rightfully due him for his injuries at the time since he was not receiving any wages or compensation during the time of his disability following his injuries. The parties did not deal at arms length. Respondent was an impoverished working man, uneducated in matters of law, suffering from a severe injury and

was not fully cognizant of his rights. Petitioner was represented by its claim agent, a man well coached and versed in matters of this nature.

It is therefore apparent that respondent because of straitened circumstances and dire need, accepted these monies as a loan in consideration of which he is supposed (according to petitioner's contention) to have forfeited his rights to prosecute this action in the manner accorded him under Section 6.

Even in the absence of the vigorous prohibitions contained in Section 5 of the Federal Employers' Liability Act there is more than enough authority based on grounds of public policy which deny the rights of parties by private agreement to deny access to particular courts. Thus for example we find in 107 A. L. R. 1060, *et seq.* and 59 A. L. R. 1445, *et seq.*, the general rule stated as follows:

> "The recent cases, like those set out in the original annotation, *have quite uniformly refused to give effect* to a stipulation in a contract limiting the jurisdiction of any action or proceeding with reference to the contract to the courts, or a particular court, of another state or country, or of another district in the same state either as defeating the jurisdiction altogether, or as a sufficient reason for declining jurisdiction * * *."

See also the *Restatement of the Law of Contracts* which contains this provision (Section 558):

> "A bargain to forego a privilege, that otherwise would exist, to litigate in a Federal Court rather than in a State Court, or in a State Court rather than in a Federal Court, or otherwise to

limit unreasonably the tribunal to which resort may be had for the enforcement of a possible future right of action, or the time within which a possible future claim may be asserted, *is illegal.*"

Certainly Petitioner's Exhibit A was a contract which attempted to extract from respondent the privilege bestowed upon him by Congress to litigate his *contemplated future* law suit in a Federal Court in the State of New York and therefore such contract *is illegal* under all existing authorities.

On this subject reference is made to the case of *Insurance Company* v. *Morse,* 20 Wall. 445, decided by this Court, where Mr. Justice Hunt ably commented at page 451:

"We see no difference in principle between the the cases supposed and the case before us. Every citizen is entitled to resort to *all* the courts of the country, and to invoke the protection which *all the laws or all those courts may afford him.* A man may not barter away his life or his freedom, *or his substantial rights.* * * *. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit *to exercise his right to remove his suit to a Federal tribunal,* as often as he thinks fit, in each recurring case. *In these aspects any citizen may no doubt waive the rights to which he may be entitled.* He cannot, however, *bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.*

That the agreement of the insurance company

is invalid upon the principles mentioned, numerous cases may be cited to prove. *Nute* v. *Hamilton Insurance Co.*, 6 Gray 174; *Cobb* v. *New England Marine Insurance Co.*, Id. 192; *Hobbs* v. *Manhattan Insurance Co.*, 56 Maine 421; *Stephenson* v. *P. F. and M. Insurance Co.*, 54 Id. 70; *Scott* v. *Avery*, 5 House of Lords Cases 811. *They show that agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.*"

Another interesting case on this subject is *Nute* v. *Hamilton Mut. Ins. Co.*, 6 Gray 174, where Chief Justice Shaw in a very enlightening opinion remarked (pp. 181, 184):

"Suppose it were stipulated in an ordinary contract, that in case of breach no action shall be brought; or that the party in default shall be liable in equity only and not at law, or the reverse; that * * * in any suit to be brought on such contract, the party sued will confess judgment, *or will waive a trial by jury;* * * * is it not obvious, that, although in a certain sense these are rights or privileges which the party, in the proper time and place, may give or waive, yet a compliance with them *cannot be annexed to the contract, cannot be taken notice of and enforced by the court or tribunal before which the remedy is sought,* * * *?

* * *. The rules to determine in what courts and counties actions may be brought are fixed, upon considerations of general convenience and expediency, by general law; to allow them to be changed by the agreement of parties *would dis-*

turb the symmetry of the law, and interfere with such convenience."

In *Meacham* v. *Jamestown, F. & C. R. R. Co.,* 211 N. Y. 346, Cardozo, *J.,* writing on this subject, cogently commented, page 354:

> "If jurisdiction is to be ousted by contract, we must submit to the failure of justice that may result from these and like causes. It is true that some judges have expressed the belief that parties ought to be free to contract about such matters as they please. *In this state the law has long been settled to the contrary.* (*Sanford* v. *Commercial Travelers' Mut. Acc. Assn.,* 86 Hun. 380; 147 N. Y. 326; *Nat. Contracting Co.* v. *Hudson R. W. P. Co.,* 192 N. Y. 209. See also; *Miles* v. *Schmidt,* 168 Mass. 339; *Fisher* v. *Merchants' Ins. Co.,* 95 Me. 486.) *The jurisdiction of our courts is established by law, and it is not to be diminished, any more than it is to be increased, by the convention of the parties.*"

Holding to the same effect are the following cases:

Benson v. *Eastern Building and Loan Association,* 174 N. Y. 83;

Parker v. *Krauss Co., Limited,* 157 Misc. 667, 284 N. Y. S. 478;

Mutual Reserve Fund Life Ass'n. v. *Cleveland Woolen Mills,* 82 F. 508 (C. C. A. 6th);

Prince Steam-Shipping Co. v. *Lehman, et al.,* 39 F. 704 (D. C. S. D. N. Y.);

Slocum, et al. v. *Western Assurance Co.,* 42 F. 235 (D. C. S. D. N. Y.);

Gough, et al. v. *Hamburg Amerikanische Packetfahrt Aktiengesellschaft*, 158 F. 174 (D. C. S. D. N. Y.);

DeGorter, et al. v. *Banque DeFrance*, 176 Misc. 1062, 29 N. Y. S. 2d 842 (1941), affirmed 287 N. Y. 483, 41 N. E. 2d 65 (1942).

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX.

Applicable Sections to Federal Employers' Liability Act.

Section 51. Liability of Common Carriers by Railroad, in Interstate or Foreign Commerce, for Injuries to Employees From Negligence; Definition of Employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

Section 55. Contract, Rule, Regulation, or Device Exempting from Liability; Set-Off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought. Apr. 22, 1908, c. 149, § 5, 35 Stat. 66.

Section 56. Actions; Limitation; Concurrent Jurisdiction of Courts; Removal of Case in State Court

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, §1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 52 Stat. 1404.